

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: July 5, 2012

513220

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In the Matter of KENNETH  
ELMORE,  
Petitioner,  
v

MEMORANDUM AND JUDGMENT

JOSEPH T. SMITH, as  
Superintendent of Shawangunk  
Correctional Facility,  
Respondent.

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Calendar Date: May 9, 2012

Before: Rose, J.P., Malone Jr., Kavanagh, Garry and  
Egan Jr., JJ.

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Kenneth Elmore, Wallkill, petitioner pro se.

Eric T. Schneiderman, Attorney General, Albany (Marcus J.  
Mastracco of counsel), for respondent.

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Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Ulster County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Following a physical altercation with another inmate, petitioner was charged in a misbehavior report with engaging in violent conduct and creating a disturbance. He was found guilty of the charges after a tier II disciplinary hearing and the determination was affirmed on administrative appeal. This CPLR article 78 proceeding ensued.

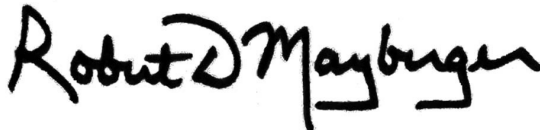
We confirm. The misbehavior report, together with the

testimony of the correction officer who prepared it and had witnessed the incident, provide substantial evidence supporting the determination of guilt (see Matter of Benson v Selsky, 50 AD3d 1347 [2008]; Matter of Kennedy v Lacy, 277 AD2d 625 [2000]). Although petitioner maintained that he and the other inmate were only playing around, this presented a credibility issue for the Hearing Officer to resolve (see Matter of Crenshaw v Fischer, 89 AD3d 1343, 1344 [2011]; Matter of Chiarappa v Fischer, 84 AD3d 1628, 1629 [2011]). His remaining contentions have not been preserved for our review due to his failure to raise them at the disciplinary hearing (see Matter of Lewis v Lape, 90 AD3d 1259, 1260 [2011], lv denied 18 NY3d 809 [2012]).

Rose, J.P., Malone Jr., Kavanagh, Garry and Egan Jr., JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court